

first decree. That is to say, he waited until he lost the case, and then applied for the revision of the order which ordered the case to be tried over again. He clearly had no merits of any kind. The Court rightly refused his application, and the reasons given by Mr. Justice KARAMAT HUSAIN are, in my opinion, mere *obiter dicta* and were unnecessary for the decision of the case.

Whether this case is one in which the Court ought to exercise its discretion in favour of the applicant is a question which necessarily raises various considerations. Taking the view I do that the court below has exceeded its jurisdiction by requiring the defendant to institute a suit in a court which has no jurisdiction over the plaintiff's suit, I cannot treat it as a mere order for an adjournment. The plaintiff appears to me to have a serious grievance. But it is not necessary for me to give my reasons for exercising a discretion which will never be exercised, as it is my duty to withdraw this judgement, which is no part of the order of the Court.

BY THE COURT.—As we have failed to agree, the application for revision must stand dismissed. We are agreed that the costs of this application will be costs in the cause.

*Application rejected.*

## APPELLATE CIVIL.

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

CHEEDA LAL (OPPOSITE PARTY), v. LACHMAN PRASAD  
AND OTHERS.\*

1916,  
December, 12.

*Act No. III of 1907 (Provincial Insolvency Act), section 47—Civil Procedure Code (1908), order XXI, rule 71—Sale of property of insolvent by receiver—Default of purchaser—Re-sale—Order by Court on purchaser to make good deficiency—“Proceeding.”*

Section 47 of the Provincial Insolvency Act, 1907, has not the effect of making the provisions of order XXI of the Code of Civil Procedure, 1908, applicable to a sale of the property of an insolvent held by a receiver under the orders of the District Judge.

If, therefore, the purchaser at such a sale defaults and the property is resold for a sum less than the original bid, the first purchaser cannot be called upon under order XXI, rule 71, to make good the deficiency. *Mul Chand v. Murari Lal* (1) referred to.

\* First Appeal No. 111 of 1916, from an order of H. N. Wright, District Judge of Bareilly, dated the 26th of February, 1916.

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The facts of this case were as follows :—

Following upon an adjudication of insolvency the receiver appointed by the court proceeded to sell by public auction a shop which, along with the other property of the insolvent, had vested in him as receiver. The shop was knocked down to the appellant for Rs. 8,700; but on his failing to deposit one-fourth of the price it was forthwith put up to sale again and was sold for Rs. 7,320. These facts were reported by the receiver to the Judge of the Insolvency Court who, thereupon, passed an order, purporting to be under order XXI, rule 71, of the Code of Civil Procedure read with section 47 of the Provincial Insolvency Act, 1907, for the recovery of the deficiency of price, namely, Rs. 1,380 from the appellant. From this order the present appeal was filed.

Babu *Preo Nath Banerji*, (with him Mr. *J. M. Banerji*), for the appellant :—

The court had no jurisdiction to pass the order. Order XXI, rule 71, of the Code of Civil Procedure relates to the execution of decrees and does not apply to a sale by a receiver under the Provincial Insolvency Act. Order XXI presupposes a decree which is under execution; and there must be an attachment, a proclamation of sale, and other preliminaries, as laid down by that order, before the stage at which rule 71 is applicable arises. Here, the sale was not in execution of a decree; there was no attachment or proclamation as provided by order XXI of the Code of Civil Procedure. None of these incidents of a sale under order XXI having been present, there is no reason for applying to the sale the particular incident which is created by rule 71 of that order. Section 47 of the Provincial Insolvency Act does not help the respondents. That section applies to proceedings in Insolvency Courts; and a sale by the receiver is not a proceeding in court but an act of the receiver. Sales by receivers are not governed by order XXI, Civil Procedure Code; *Mul Chand v. Murari Lal* (1). Even assuming that order XXI, rule 71, is applicable at all, the order of the lower court is illegal. The appellant having failed to deposit one-fourth of his purchase money the shop was forthwith put up to sale. Under such circumstances here was no sale to the appellant at all; and hence there was no

"re-sale" within the meaning of order XXI, rule 71; *Amir Begam v. The Bank of Upper India* (1).

Mr. M. L. Agarwala, for the respondents :—

The wording of section 47 of the Provincial Insolvency Act is wide enough to make the provisions of order XXI, rule 71, applicable to sales held by receivers in insolvency under the directions of the court. That section not only governs the procedure of the Insolvency Court in all proceedings before it, but also declares that such court shall have, in regard to all proceedings *under the Act*, the same powers as it has in the exercise of its original civil jurisdiction. A sale conducted by the receiver under the directions of the court is, if not amounting to a proceeding in court, certainly a proceeding under the Provincial Insolvency Act. So that, the Insolvency Court can exercise the same powers in respect of the sale as a Civil Court can in the case of a sale which has taken place in the exercise of its ordinary civil jurisdiction. When the sale has taken place and the matter has come before the court on a report made by the receiver, subsequent proceedings are proceedings in court, and such of the provisions of order XXI of the Code of Civil Procedure as apply to proceedings in the Civil Court subsequent to sale apply equally to the Insolvency Court after the sale by the receiver. For these reasons order XXI, rule 71, does apply to the present case, although the whole of order XXI may or may not apply to sales by receivers in insolvency. Order XXI, rule 71, does not in terms refer to sales held in execution of decrees ; so there is nothing in the rule itself which is repugnant to its applicability to a case like the present. A sale conducted by a receiver in insolvency is not exactly like a sale held by a private individual of his own property. The sale takes place under the orders or directions of the court and is held under the provisions of an Act. Where the court does not appoint a receiver, the court itself holds and conducts sales. Where it appoints a receiver he is a sort of agent of the court entrusted with such functions. The functions of a receiver are analogous to those of an execution court. He is the representative of the general body of creditors. The order of adjudication is analogous to the

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decree under execution. Just as, after attachment in execution a creditor can do nothing but apply to the court, so a creditor in insolvency can do nothing but apply to the receiver. These considerations show that the provisions of order XXI, Civil Procedure Code, are not so foreign and inapplicable to sales conducted by receivers in insolvency as the absence of a decree would at first sight make them appear to be.

Babu *Preo Nath Banerji*, was not heard in reply.

PICCOTT, J.—This is an appeal against an order passed by the District Judge of Bareilly in the exercise of insolvency jurisdiction. One Kanhai Lal had been adjudicated insolvent. He owned a shop in the town of Bareilly. This shop became vested in the receiver appointed by the court, one Babu Sri Ram. Under the direction of the court the receiver proceeded to sell the shop by auction. Cheda Lal, who is the appellant before us, bid up to Rs. 8,700 ; but on being called upon to deposit one-fourth of the purchase money, failed immediately to do so. The receiver then put up the property for sale again and it was purchased by another person for Rs. 7,320. These matters having been reported to the court, the learned District Judge has ordered execution to issue against Cheda Lal for the sum of Rs. 1,380. His order purports to have been passed under order XXI, rule 71, of the Code of Civil Procedure, read with section 47 of the Provincial Insolvency Act: It is contended before us in appeal that the District Judge had no authority to pass the order complained of, and that the receiver's remedy, if any, for the tort alleged to have been committed by Cheda Lal is by a suit for damages. The question is whether section 47 of the Provincial Insolvency Act operates so as to confer upon a District Judge all powers, and to impose upon him all duties, in connection with the sale of an insolvent's property by a receiver which are provided by order XXI of the Code of Civil Procedure in connection with the execution of decrees of civil courts. So far as I am concerned I have already expressed a contrary view in the case of *Mul Chand v. Murari Lal* (1). I have there held that the provisions of order XXI of the Code of Civil Procedure do not apply to sales by a receiver in bankruptcy. The point has been re-argued to-day

with much keenness and ability by Mr. *Agarwala* on behalf of the respondents ; but apart from the question of applying the principle of *stare decisis*, I am not satisfied that the view taken by me in the reported case is erroneous. I think that the powers conferred upon a court, and the duties imposed upon a court, by order XXI of the Code of Civil Procedure have to do with the execution of civil court decrees, the foundation of which is a decree for sale, or an attachment duly effected in accordance with the provisions of the order itself. The position of the receiver is that of a man in whom certain property has become vested. It has no doubt vested in him as a trustee for other persons ; but for all that he is in law the owner of the property. He has authority under the Provincial Insolvency Act, section 20, to sell the same and his power of sale cannot be limited by the provisions of order XXI of the Code of Civil Procedure, as it would have to be if the contention for the respondents now before us were correct. Except that the receiver is bound to act under the directions given him by the court, and that any person aggrieved by any act or decision of the receiver has a right of appeal to the court under section 22 of the Provincial Insolvency Act, the position of the receiver is simply that of a private person owning certain property who is under a necessity to convert the same into cash as readily as possible. I think the consequences which would follow from fettering the receiver by all the details of procedure which order XXI of Act V of 1908 provides for execution of Civil Court decrees would be undesirable and that there is nothing in section 47 of the Provincial Insolvency Act which compels us to take such a view. If, however, the court, or the receiver acting under orders of the court, is not bound to follow all the procedure laid down by order XXI, aforesaid, including the necessity for attaching the property sought to be realized, for issuing a proclamation of sale, for hearing objections preferred as to ownership of the property or the like, neither can it be held that the court becomes invested with special powers such as those conferred upon an execution court by order XXI, rule 71, of the Code of Civil Procedure. I think, therefore, that this appeal must be allowed, and I would decree it accordingly, setting aside so much of the order of the court below dated the 25th of February,

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1916, which has directed that the deficiency in the sale proceeds to the extent of Rs. 1,380 be realized from Cheda Lal under order XXI, rule 71, of the Code of Civil Procedure. The appellant is entitled to his costs in this and in the lower court. This may be paid by the receiver out of the insolvent's estate.

WALSH, J.—I entirely agree. I think a sale by the receiver is an act of the receiver and not a proceeding at all. All the places where the word 'proceeding' occurs in this Act indicate that a proceeding in court is intended. I think that view is strengthened by comparing sub-section (1) of section 47 with sub-section (2). Sub-section (1) clearly deals with a proceeding under this Act before the court itself and provides that the court in regard to proceedings under this Act (that is before itself) shall follow the same procedure as in the exercise of original civil jurisdiction. Sub-section (2) deals with High Courts and District Courts and in regard to proceedings under this Act not before the court itself but brought before it from a court subordinate to it. From this, it is abundantly clear that a proceeding under section 47 is a proceeding in the ordinary meaning of the word. There is no proceeding under the Provincial Insolvency Act to enable an Insolvency Court to call upon a stranger to the bankruptcy to show cause why he should not pay a sum which may or may not be due from him. Our decision in no way prevents the receiver from bringing an action for such loss as he has sustained owing to the breach of contract on the part of the appellant, if there was one.

BY THE COURT.—The appeal is allowed and so much of the order of the court below, dated the 25th of February, 1916, as directed that the deficiency in the sale proceeds to the extent of Rs. 1,380 be realized from Cheda Lal appellant under order XXI, rule 71, of the Code of Civil Procedure is set aside. The appellant will have his costs here and in the court below. It may be paid by receiver out of the insolvent's estate.

*Appeal decreed.*